



Sous la direction de prof. Karl HANSON

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EVOLUTION OF THE LAW(S) ON CORPORAL PUNISHMENT IN TANZANIA MAINLAND

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par

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**EVOLUTION OF THE LAW(S) ON CORPORAL PUNISHMENT IN
TANZANIA MAINLAND.**

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I. SUMMARY

Tanzania Mainland is a signatory to the United Nations Convention on the Rights of the Child (1989) and is bound to the directives and recommendations of the Committee of the Rights of the Child which monitors the implementation of the Convention. The Committee and other international instruments have at different times and in different reports, recommended to Tanzania Mainland to take legal measures to prohibit all forms of corporal punishment *id est*, at family level, in school, judicial system and in alternative care settings.

However Tanzania Mainland has passed the Law of the Child Act, 2009 which indirectly legalizes the administration of corporal punishment to children. As a result, administration of corporal punishment to children in families, schools, juvenile courts and alternative care settings remains lawful.

Hence in this study, we have from a historical perspective attempted to show why Tanzania Mainland despite the call from various international instruments has retained the law on corporal punishment.

II. DECLARATION

I, Respicius ISHENGOMA, declare that the work to be submitted in this dissertation is a result of my own work except where otherwise stated.

I further declare that to the best of my knowledge, this dissertation has never been submitted to any other university for any degree and that it is not being concurrently submitted elsewhere.

Respicius Ishengoma

...../February, 2012.

III. DEDICATION

I dedicate this work to my first born son, Felix MUGISHA and my wife Christina. When I left the country for this study, Mugisha was three months old; a period of great need for fatherly support. However, I had no choice only to embark on this work while expecting their understanding and tolerance to be an encouragement to me. This has been the reality throughout the period of study and Mugisha has attained an age at which he can communicate with me.

IV. ABBREVIATIONS

ASP	Afro-Shiraz Party.
CCM	Chama Cha Mapinduzi.
CAP	Chapter.
ECHR	European Court of Human Rights.
GDP	Gross Domestic Product.
KNPA	Kilimanjaro Native Planters Association.
R.E	Revised Edition.
TAA	Tanganyika African Association.
TANU	Tanganyika African National Union.
TPA	Tanganyika Peoples Party.
UNCRC	United Nations Convention on the Rights of the Child.
UNESCO	United Nations Education, Scientific and Cultural Organisation.
USA	United States of America.

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EVOLUTION OF THE LAW(S) ON CORPORAL PUNISHMENT IN TANZANIA MAINLAND.

1. Research problem

Tanzania Main land has passed the Law of the Child Act, 2009 under Act No.21 of 2009 which among other objectives is to provide for reform and consolidation of the laws relating to children, to stipulate rights of the child and to promote, protect and maintain the welfare of the child with view to giving effect to international and regional conventions on the rights of the child.

However under section 13(2), the said law provides a ‘person’ with the right termed as ‘justifiable correction of the child’. The word ‘person’ is not defined in this Act but according to Longman Modern English Dictionary, it means a man, woman or a child. The term ‘child’ is defined under section 4 (1) of this Act as a *person below the age of eighteen years*. Hence, for purposes of this dissertation, the term ‘person’ will mean any person who is not child.

For the sake of clarity, section 13.(1) states: “A person shall not subject a child to torture, or other cruel, inhuman punishment or degrading treatment including any cultural practice which dehumanizes or is injurious to the physical and mental well-being of a child”.

(2) “No correction of a child is justifiable which is unreasonable in kind or in degree according to the age, physical and mental condition of the child and no correction is justifiable if the child is by reason of tender age or otherwise incapable of understanding the purpose of the correction”.

From the above citation, it is clear therefore, as long as the administration of a punishment is for the sole purpose of correcting a child and is apparently ‘reasonable’, then it is legal. To crown it all, under Tanzanian perspectives, it is undisputable that a common and usual way of correcting a child is corporal punishment: in school, it is provided by Act No.25 of 1978 and it was even defended by the minister for Education and Vocation Training in her official capacity (Daily News, 01, May 2006). In Courts while dealing with minors it is provided for by CAP 17 (R.E.2002) and it is a normal practice (Citizen, 19, July 2008). Moreover, it is provided for in the Holy Bible (Proverbs, 13: 24) whereby at least half of the Tanzanians are Christians (Ludwig, 1999) and believe in it. It is also a traditional way of correcting a child (Final Report of Law Reform Commission of Tanzania, 1996; Hansards, Parliament of

Tanzania, 04th November, 2009). Hence, there is no doubt even if the said law does not explicitly mention 'corporal punishment' what is meant by 'justifiable way of correcting a child' cannot be any other way than corporal punishment. Thus under this law corporal punishment is lawful in schools, juvenile courts, in alternative care settings and at home.

However, Tanzania ratified the UNCRC in 1991 without any reservations. Hence the provision under section 13(2) (justifiable correction) is in contravention with article 19 (1) of the UNCRC which states that "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence while in the care of parent(s), legal guardian(s) or any other person who has the care of the child". Further, it is in direct conflict with article 28 (2) which requires the school discipline to be administered in a manner consistent with the child's human dignity and in conformity with UNCRC and article 37 which prohibits torture, other cruel, inhuman or degrading treatment or punishment to a child.

Moreover, the Committee of the Rights of the Child which monitors implementation of the UNCRC, in examining states parties' reports since 1993 has consistently stated that legal and social acceptance of physical punishment of children, in the home and in institutions, is incompatible with the Convention. It recommends to states parties to the Convention, the prohibition of physical punishment in families, institutions and public education campaigns to encourage positive, non-violent discipline in family, school and other institution. (CRC/C/GC/8; Saunders et Goddard, 2010; Save the Children-Sweden).

Furthermore it emphasized that there is no ambiguity, elimination of violent and humiliating punishment of children through law reform and other necessary measures is an immediate and unqualified obligation of the states parties. It also condemns many states parties that allow some level of violent punishment as "reasonable chastisement", "moderate correction", and so on (CRC/C/GC/8*; Saunders et Goddard, 2010).

The Committee through the General Comment No. 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, urges the State party to:

- (a) Explicitly prohibit all forms of corporal punishment in the family, schools, penal system and other institutional settings and alternative care systems as a matter of priority;

- (b) Sensitize and educate parents, guardians and professionals working with and for children by carrying out public educational campaigns about the harmful impact of corporal punishment; and
- (c) Promote positive, non-violent forms of discipline as an alternative to corporal punishment (CRC/C/GC/8*).

The Committee with specific reference to Tanzania notes with regret that the law does not prohibit the use of corporal punishment as a sentence for children and youth in the juvenile justice system. In 2006 it recommended that the state party should explicitly prohibit as a matter of priority all corporal punishment in the family, schools, the penal system, institutions and alternative care contexts (CRC/C/TZA/CO/2, para. 34). The Committee made similar recommendations in 2001 (CRC/C/15/Add.156, paras. 39 and 67). The Human Rights Committee recommended prohibition of corporal punishment in schools in 1998 (CCPR/C/79/Add.97, para. 16).

1.1 Purpose and scope of the study

The main purpose of the study is to demonstrate the evolution of law(s) on the administration of corporal punishment to children in families, in schools, juvenile courts and in alternative care settings. It will specifically demonstrate legislations that were applicable in pre-colonial Tanganyika, during German rule, British rule and after independence up to date.

The study however confines itself to Tanzania Mainland in exclusion of Tanzania Zanzibar. The reasons rest in the fact that Tanzania mainland was a colony and part of German East Africa from the 1880s to 1919. As a result of the First World War under the League of Nations, it became a British mandate until the attainment of independence in 1961. (Taylor, 1963; Iliffe, 1979; Lohrmann, 2007). Hence, applicable legislations before and during colonialism are different and after independence continue to be different except for union matters (Shivji, 1990).

Tanganyika became a sovereign state on 9th December, 1961 and became a Republic the following year on 09th December 1962. Zanzibar became independent on 10th December, 1963 and the People's Republic of Zanzibar was established after the revolution of 12th January, 1964 (Shivji, 1990; Othman, 2009). The two republics entered into union on April 26, 1964 under Union Agreement termed as Articles of Union to form one sovereign Republic, hence the United Republic of Tanganyika and Zanzibar (Shivji, 1990; Nyirabu,

2002; Othman, 2009) which later on was renamed the United Republic of Tanzania on October 29, 1964. (Othman, 2009).

The Articles of Union provide for the existence of two governments: One for the whole United Republic for all Union matters and for non-Union matters in Tanganyika, which under the Constitution of the United Republic of Tanzania, 1977 (as amended) is referred to as Tanzania Mainland, and one for Zanzibar in all matters that are non-Union (Shivji, 1990; Othman, 2009).

The study will dwell on the United Republic of Tanzania (Mainland) which is a nation in East Africa bordered by Kenya and Uganda to the north, Rwanda, Burundi and the Democratic Republic of the Congo to the west, Zambia, Malawi and Mozambique to the south. The country's eastern borders lie on the Indian Ocean (Iliffe, 1969, 1979).

1.2 Research question

The research and data collection will be guided by two questions:

(a) What was/is the law(s) on corporal punishment in different periods? The history of Tanzania mainland can be categorized into four (4) major periods, id est before colonialism, during German colonial era, the British colonial rule and from independence up to date. In all these periods, there have been different laws on administration of corporal punishment to children. Research findings will try to identify them and describe their applicability with respect to each period.

(b) Why the law on corporal punishment is the way it is to date. The Law of the Child Act, 2009 has retained corporal punishment as a method of correcting a child not only at homes but even at schools, in penal system and in alternative care settings. Despite the call of the Committee and other international instruments which have urged all state parties to UNCRC to unquestionably prohibit the use of corporal punishment in all its forms under the law (CRC/C/GC/8*), Tanzania mainland has turned a deaf ear to them. Thus, research findings will make an attempt to answer the question.

1.3 Research Methodology

The research will be based on two major methods, id est;

(a) Secondary data.

For purposes of this study, secondary data will constitute the major method of data collection. It will involve personal documents, official documents, physical data and archival sources. (Johnson et Turner, 2003).

Official documents will include official reports of commissions, speeches, video recordings which are ultimately reduced into writings by members acting on behalf of the organizations, public and private institutions for and on behalf of the government.

Data collection will further involve reported cases in Tanzanian media, notably circulating daily newspapers including Mwananchi, Nipashe, THE CITIZEN, DailyNews, Mtanzania and internet blogs. One will have to rely on this method as in Tanzanian context hardly can one find such texts as journals or books on corporal punishment in general. A vivid example is derived from 'HAKI ELIMU' (literal translation is 'Right to Education') a non-governmental organization which in 2011 celebrated its 10th anniversary with 178 publications. However, there is none about corporal punishment not only at homes but even at schools.

(b) Interview

The method targets at people who lived and studied during the British era to get some information on how corporal punishment was being practiced at homes and at schools during that period. This is due to the fact that the National Education Act No.25/78 which regulates the administration of corporal punishment in schools was enacted in 1978. Hence interviews seek to get some information and personal experiences from resourceful persons who studied between 1920 and 1977. According to Johnson and Turner (2003), such type of interviews range from unstructured to semi-structured questions.

1.4 DATA COLLECTION AND ANALYSES

1.5 Concepts and Definitions.

Corporal punishment is described as the use of physical force towards a child for purposes of control, correction or discipline with an intention of causing some pain or discomfort. It can be administered in several ways such as spanking, smacking, slapping, popping, paddling, punching or whipping and hitting tending to secure obedience to a rule of law or conduct (Gershoff, 2002).

Corporal punishment can be slightly differentiated from physical abuse such that while corporal punishment causes pain, it does not cause injury (Braddock, 2003) and if it is administered too severely or too frequently, it crosses the line into physical abuse (Gershoff, 2002).

A typical case which happened at Kizaru village (Musoma rural district in Mara region in Tanzania) may be helpful in illustrating physical abuse. In this incidence, a caretaker burnt the hands of a 8 year old boy on suspicion of theft of a piece of fried fish. The victim was

severely injured and thereafter hidden in the house and was being treated by traditional medicine instead of being admitted at the hospital. His fellow children in the neighborhood reported the incident to their teacher and ultimately the matter was captured by the media. (<http://kiongozi.tripod.com/K2000/maoniagusti1.htm>). In this case, the victim did not only suffer pain but also injuries which appear to have crossed the line of corporal punishment. (Gershoff, 2002).

Hence, unlike physical abuse, corporal punishment is defined as “the use of physical force with the intention of causing a child to experience pain, but not injury for the purposes of correction or control of a child’s behaviour” (Gershoff, 2002: 540; Braddock, 2003:2; Straus et Donnelly, 2005:4). This definition is in line with what is otherwise termed as ‘instrumental’ *id est*, when corporal punishment is planned, controlled and not accompanied by strong parental emotion. Thus it is subject to reasonable, moderate, appropriate and necessary force used and its objective being the correction or control of a child’s behaviour (Gershoff, 2002).

On the contrary, physical abuse is characterized by infliction of physical injury as a result of punching, beating, kicking, biting, burning, shaking or otherwise harming a child. In such cases, a parent or caretaker may not have intended to hurt a child but rather injuries come as a result of excessive or unreasonable corporal punishment (Gershoff, 2002). Indeed this is termed as ‘impulsive’ when it occurs at the spur-of-the moment accompanied by feelings of anger, consequently resulting into being out of control. (Gershoff, 2002).

However according to Gershoff, there is no consensus on where to draw the line to demarcate corporal punishment and physical abuse since they are rather a continuum (Gershoff, 2002; Voll et al., 2010). That might certainly be the reason why the definition of corporal punishment given by the Committee of the Rights of the Child seems to incorporate both corporal punishment and physical abuse as one and the same thing.

For purposes of this study, I will adopt the definition of corporal punishment given by the Committee of the Rights of the Child as ‘corporal’ or ‘physical’ punishment “is any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting (‘smacking’, ‘slapping’, ‘spanking’) children, with the hand or with an implement – whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching,

burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices'' (CRC/C/GC/8*).

2. CORPORAL PUNISHMENT IN PRE-COLONIAL TANGANYIKA.

This part covers the period from 1800 up to early time before colonialism in 1880s at the time when Tanganyika as an entity (Tanzania mainland) as we know it today was not yet born. During that period, (pre-colonial Tanganyika) existed several kingdoms/chiefdoms with proper boundaries, population, languages, religion/beliefs, political system and economic activities varying from one kingdom to another.

For purposes of this dissertation, this part will be further subdivided into major three parts, firstly, the description of population, political structure/system, economic activities, religion and beliefs. Secondly, it will identify and describe the law(s) on corporal punishment in relation to children that existed at the epoch if any. Thirdly, it will be the discussion of matters arising from this part.

2.1 Population, Political structure, Economic activities and Religion

Until 1800 the population was unevenly distributed. Some areas mostly the arid and semi-arid in the modern Ugogo (Dodoma) were scarcely populated while the savannah woodlands in the south-east, north-east and south-west across the country were completely uninhabited and areas below 1000 meters being sparsely populated (Iliffe, 1979).

The reason behind is that such areas were not fit for human habitation at the epoch. The climatic conditions in the semi and arid areas for instance were unfavourable for agricultural activities while the savannah woodlands were homes for tsetse flies and areas below 1000 meters were full of mosquitoes (Iliffe, 1979).

However, other parts of the country were densely populated. These areas include the whole of the inter-lacustrine region in the modern Haya and Sukuma areas, the north-east, the modern Chagga and Pare areas to the south-west, the modern Ngoni, Nyakusa, Fipa areas across the country including the rift valley and the southern highlands, the coastal areas of Kilwa Kivinje, Pangani and Bagamoyo (Iliffe, 1979; Rockel, 2000).

Political systems that were operational in pre-colonial Tanganyika in 1800 ranged from complete statelessness to chiefdoms. In many parts of the country there were chiefs (kings) under different names such as Mangi in Kilimanjaro, Mkwawa of Iringa and Omukama (king) in Bukoba (Cory et Hartnoll, 1971; Iliffe, 1979; Rodney, 1973).

An example of how politically these chiefdoms were structured at the epoch is taken from Haya states in the inter-lacustine region. The Haya states (chiefdoms) were composed of clans such as Batundu, Bahunga, Bagombe, Banyuma, Baihuzi, Basimba, Basaizi and Bakuma which are indigenous ones. Hence the totality of individuals and the clans under the leadership of their chief admitted themselves to be an *Ihanga*, id est a nation (Cory et Hartnoll, 1971).

Hereunder are the chiefdoms that existed in Bukoba according to Cory et Hartnoll.

State	Geographical position	Nationality
Ihanga	Kiamtwara	Bayoza
Ihanga	Ihangiro	Banyaihangiro
Ihanga	Kianja	Bahamba
Ihanga	Karagwe	Banyambo
Ihanga	Maruku	Bakala
Ihang	Bugabo	Bahendangabo
Ihanga	Kiziba	Baziba
Ihanga	Missenyi	Babumbiro

These states up to the present have their proper boundaries and accent. As put by Cory et Hartnoll “the origin of the boundaries of the chiefdoms is not known. That the chiefdoms became internally cemented units is shown by the fact that they developed dialects of their own and differences in law and customs” (Cory et Hartnoll, 1971: 290).

The map of Tanzania mainland describing geographical areas



In coastal regions around the Indian Ocean, the major economic activity was commerce with Arabs and Indians merchants across the Indian Ocean to the Far East. Arab traders carried products such as ivory, gold, gum copal, mangrove poles and slaves to markets of Asia and in return, they brought back cowries, porcelain, clothes and other commodities (Gray et Birmingham, 1970; Iliffe, 1979).

For a long time inhabitants in the coast had little contacts with the interior. As a result, the contacts with Arabs and Indian merchants inspired Islam to become a major religion in the coast as well as Swahili as an important language. Due to intermarriage, the Swahili culture which was peculiar in the coast came into being, hence the Swahili people (Gray et Birmingham, 1970; Iliffe, 1979).

In the interior, the Nyamwezi had already established themselves in trade by dominating the central route and monopolized the business. In their struggle, they penetrated up to the coast, came into contact with Swahili-Arab traders (Rockel, 2000; Gray et Birmingham, 1970; Iliffe, 1979; Unomah, 1972). By 1850 they had more caravans trading in the coast out numbering the coast men (Gray et Birmingham, 1970).

As a result of penetration to the coast, ivory trade aroused an appetite of tapping ivory from its source in the interior. Consequently routes connecting the coastal trading cities with interior trading centers were opened up. These include routes leading to Lake Malawi up to Bemba country (modern Zambia), Kamba of modern Kenya, Upare and Kilimanjaro. Other centers were across the inter-lacustrine kingdoms of Buganda and Bunyoro, Karagwe, Ujiji and Uha. Up to 1870 it was a hard work to find any part of the interior that was not affected by commerce of the coast men whereby Tabora (Nyamwezi) served as the inland entrepot for the trade (Gray et Birmingham, 1970; Unomah, 1973; Iliffe, 1979; Rockel, 2000; Hakansson, 2004).

One of the impacts of this trade was the spread of Islam and Swahili to the interior. Apart from coastal regions such as Kilwa, Pangani, Tanga and Bagamoyo, Islam, hand in hand with Swahili emerged as major religion and main trading language in interior trading centers especially Tabora and Ujiji. (Gray et Birmingham, 1970; Unomah, 1973; Iliffe, 1979).

However, more than 90% of the population spoke Bantu languages, such as Sukuma in present Mwanza, Haya in Bukoba, Nyakusa in Mbeya and Chagga in Kilimanjaro, Nyamwezi in Tabora and Kiha in Kigoma. (Gray et Birmingham, 1970; Iliffe, 1979; Moore, 1978).

Apart from the influence of Islam, the indigenous people continued with their traditional religions and beliefs. They believed in deities who were in most cases natural spirits, ancestors and heros that communicated to them through possession (*okubandwa*) (Cory et Hartnoll, 1971; Rodney, 1973; Iliffe, 1979).

2.2 Applicable Law on corporal punishment

This particular period raises the question as to under what law(s) was corporal punishment being administered to children. As evidenced by different authors and witnessed by concrete examples, there is no doubt that corporal punishment was being administered to children (Mwakikagile, 2000; Peterson, 2006; Final Report of Law Reform Commission of Tanzania, 1996).

In everyday life from the words of an historian Mwakikagile, it is clear that the administration of corporal punishment to children was an order of the day and was un questionable. He puts it that “Europeans introduced many new ideas and institutions that did not fit in with the African traditional way of life..... Even the way justice, a universal value was dispensed

by Europeans was not only unjust but alien to Africans in many ways. Africa did not even have prisons before the coming of Europeans.....The introduction of prisons, forced labour, corporal punishment for adults (which was unthinkable in our traditional society to whip an adult)..... ’’ (Mwakikagile, 2000: 66).

At home, corporal punishment was a method of correcting a child from bad behaviours. At the epoch children could be severely punished simply by attending church teachings. As it is evidenced, a young girl named Chausiku watched her mother dying. She was taken into the home of Chogamawano a senior man. Chausiku found Chogamawano a harsh taskmaster. When he discovered that she had been attending church at Mamboya, ‘‘he held my hand and heavily slapped my face and held my throat while threatening to strangle me’’ (Peterson, 2006:997).

Another evidence is drawn from hansards by quoting Paul P.Kimiti (a member of parliament in Tanzania mainland) while contributing to the parliamentary debate on the ‘Law of the Child Bill, 2009’ he pleaded that the law should make it as a matter of necessity to guard our culture and traditions against western interference. Even though Kimiti did not mention directly corporal punishment, it is clear that a move to ban corporal punishment against children in all its forms is one of western influence to which he is against. He added that ‘‘we (Tanzanians) are not obliged to follow western culture’’ (Hansards, Parliament of Tanzania, 04th Novemeber, 2009).

However during the period in consideration, we can hardly find a law which imposes an obligation to refrain from administering corporal punishment to a child. As put by Woodman ‘‘laws generally impose obligations, both to do and to refrain from doing. When an obligation is imposed upon one person for the benefit of another and certain conditions are present, that other is said to have a right’’ (Woodman, 2001: 7). However it is an undisputable fact that corporal punishment was being practiced.

From the above findings corporal punishment was administered to children at home. With respect to this period, literatures are silent on juvenile courts and procedures, care institutions and formal schools. This fact creates a doubt as to whether these institutions existed at the epoch to be considered to apply corporal punishment.

2.3 Discussion.

The issue arising from this part is the ‘concept of law’ in relation to customary rights in pre-colonial Tanganyika. Law is and has been perceived differently in parts of the world and at different epochs of human history. There are different positions as to what constitutes law, that is major and vital elements without which one cannot speak of existence of law. The discussion will be based on these different positions as applied to pre-colonial Tanganyika (Tamanaha, 1995; Arthurs, 1996; Woodman, 2001).

As already presented above, up to 1800 the political system that existed ranged from complete statelessness to chiefdoms (Cory et Hartnoll, 1971; Rodney, 1973; Iliffe, 1979). For that matter, there is no doubt that a state (Tanganyika) which is Tanganyika did not exist. It is from this fact that some scholars argue that law cannot be separated from a state, thus no law without a state (Arthurs, 1996). In other words, one cannot speak of the existence of a law in pre-colonial Tanganyika as the state was still in an embryo stage.

Such a position is propounded by eminent legal scholars and philosophers in conceptualizing ‘what is law and when does it come into existence’. Arthurs argues that the notion of law without a state “is if not exactly oxymoronic at least a challenge to the ingrained assumptions and professional experience and most lawyers.....We take law and state to be inextricably linked” (Arthurs, 1996:1). According to him, law is a set of norms authoritatively pronounced by state institutions such as the legislature, judges and it should be interpreted and enforced by mandated state officials such as magistrates, judges and policemen respectively (Arthurs, 1996).

On his part, Kelsen describes law as consisting of a measure of coercion and enacted by the order and socially organized (Kelsen, 2009). To him, coercion is a vital element. Hence law is a system based on coercion that orders human behaviours. On that basis one is likely to raise an argument that it is the state which is most fit to such a system. Thus, there seems no separation of state and law in consideration of Kelsen’s proposition as regards vital elements of law.

However on the other side of the coin, Tamanaha argues that if that were the position, then it would result in the conclusion that many societies from historical perspectives had no laws.

Law has different concepts and that is why scientists have declared that no society without a law (Tamanaha, 1995).

Moreover, Woodman argues that as long as there is ‘recognition’ and enforcement of customary laws in the same way as state laws, then institutions or norms of customary law form part of state law. Recognition occurs for instance by incorporating customary laws into state legal system or are simply enforced by state institutions such as courts. (Woodman, 2001).

In Tanganyika customary laws for example the Haya Customary law are recognized and incorporated under the ‘Local Customary Law (Declaration) Order, Government Notice No.279 of 1963. We find that such an explicit recognition by the government of Tanganyika was an acknowledgement that “it already existed as law outside of, and prior to state law” (Woodman, 2001:2). The state therefore cannot claim to have the monopoly of legal system in the existence of customary law. (Woodman, 2001). To put it in the other way, sources of law in Tanganyika include customary laws (Fimbo, 1993).

From this discussion it is clear that a state tends to be a monopoly of legal field including the enactment of the law. However legal norms are created in many different ways, hence ‘Legal Pluralism’ (Tamanaha, 2007). It is important to differentiate between statutory law and customary law. The pre-colonial societies in pre-colonial Tanganyika had customary laws even though did not directly impose an obligation to refrain from or administer corporal punishment to children.

3. CORPORAL PUNISHMENT DURING THE GERMAN RULE.

This part will cover the period from 1880s up to 1919 when the German reign came to an end in Tanganyika. Tanganyika does no longer exist as a political unity and did not exist either during German rule. The term is used to describe today’s Tanzania mainland which at the epoch formed part of German East Africa (Deutsch Ostafrika). It is equally important to note that German East Africa comprised modern Tanzania mainland, Rwanda and Burundi (Iliffe, 1969).

In this particular period, the study will focus on three major issues. The first focus will be on the population, political struggle and structure, economic activities, religion and beliefs. On

the second part, there will be a look at the law which was in force in relation to administration of corporal punishment to children and the third part will be the discussion on matters arising out of this period.

3.1 Population, Political structure, Economic activities and Religion

In history of Tanganyika, this is the worst period in which it suffered unimaginable loss of population. It happened through natural disasters (diseases and locusts), hunger, wars and harsh working conditions (Iliffe, 1969, 1979; Andrew et al.1981; Mwakikagile, 2000; Stearns, 2008; Eley et Ratalack, 2008; Conrad, 2010).

The decade of natural catastrophes was marked with rinder pest (cattle plague) in early 1891. It entered into northern part of Tanganyika having been first introduced in Ethiopia by the Italian army. It was fatal to livestock which killed 90%-95% of the cattle. The pure pastoralists such as the Masai suffered the most resulting into deaths due to hunger. The Masai death alone ranged from two fifth to three quarters of the entire population (Iliffe, 1979). In this chain of natural catastrophes, then followed the smallpox in 1893. In Dar es salaam alone it killed 600 people, almost a tenth of the population. However, it spread all over the country (Iliffe, 1979; Mwakikagile, 2000).

Finally came the locusts. Even though it was not the first plague to happen in Tanganyika, it had never affected a large part as the period in 1893-1895, 1897-1999 and 1903-1905. Consequently it resulted into deaths due to famine as locusts fed on every green plant (Iliffe, 1979). As remarked by a Bondei woman “people are dying everywhere like animals, two and two” (Iliffe, 1979:125).

Tanganyika went on suffering the loss of population through wars of political power. In principle there were three major wars or campaigns fought against the Germans in East Africa which can be termed as Abushiri Rebellion in 1888-1890, Hehe War in 1891-1898, and the Maji-Maji Revolt in 1905-1907. The most important in history is Maji-Maji rebellion (Iliffe, 1969, 1979; Stearns, 2008). The Maji-Maji uprising in 1905 was a major African revolt against the Germans in German East Africa. It was engineered by Kinjekitile Ngwale of Ngaramba and spearheaded by the Ngoni, Pangwa and other Bantu peoples aiming at restoring the older order which was manifestly seen to be destroyed by the colonial presence (Iliffe, 1969, 1979; Stearns, 2008; Conrad, 2010).

The uprising met the harsh response from the Germans which claimed more than 200,000 lives in Tanganyika (Iliffe, 1969, 1979; Stearns, 2008; Conrad, 2010). Moreover many people died as a consequence of war due to hunger as the Germans burnt villages, food and crops. In Tanga district for instance, the population fell from 123,308 to 61,328 (Iliffe, 1969, 1979; Stearns, 2008; Conrad, 2010; Mwakikagile, 2000).

In the struggle for political control and transformation of Tanganyika into a colonial economy, the Germans entered into various agreements to fix the boundaries which defined Tanzania mainland as we know it today. The November 1886 Anglo-German agreement fixed the northern borders inland to Lake Victoria and a month later, the southern border with Mozambique was settled. The western border was already defined by the Germans in recognizing Congo as Free State. Further, the Anglo-Germany agreement of December 1886 whereby Sayyid Said (sultan of Zanzibar 1854-1893) agreed to limit his mainland possession to 10 miles strip along the coast resulted into the birth of Tanganyika as regards political borders (Iliffe, 1979).

In the struggle to control the caravan route, the Germans faced a tough resistance from the well established interior chiefdoms such as Sina of the Chagga, Machemba of the Yao, Mkwawa of the Hehe. While Herman von Wissmann (soldier) escaped death in the battle, Emil von Zelewski (a soldier and German officer) was killed by Mkwawa's army (Iliffe, 1979).

In reality peculiarities of German style and methods of political control were based on violence, especially forced labour, arrest, corporal punishment (Mwakikagile, 2000) and alliance with accommodating African leaders. A good example is chief Kiwanga of lowland Bena who allied with Germans against Mkwawa, Kahigi of Kianja against his rivals in Bukoba and Marealle of Marangu in the struggle for Kibosho and Moshi (Iliffe, 1979).

During this period economic activities were transformed to suit the colonial economy. Hence through forced labour, the Germans introduced for instance cultivation of cash crops such as coffee in Bukoba and Moshi, cotton in Mwanza and sisal in Tanga (Iliffe, 1979; Mwakikagile, 2000). As a result indigenous people were either to offer labour in settlers' farms or cultivate the same crops or suffer corporal punishment and forced labour (Iliffe, 1979).

Nevertheless this period is marked also by religious and cultural change in the struggle between indigenous religions and Christianity. In Buhaya for instance, while the *kubandwa*

cult led opposition to Christianity, some chiefs like Kimbu used the Uwezela society to make resistance to Christianity. Mutahangarwa of Kiziba welcomed education in his territory but refused to become a Christian (Iliffe, 1979).

The opposition went further to connect Christianity with natural disasters. Both the Pare and Nyakusa religious leaders for instance concluded that rinderpest was due to the arrival of missionaries. The Nyamwezi and Sukuma found that drought was due to religious innovations (Iliffe, 1979).

3.2 Applicable Law on corporal punishment

The 26th November 1895 became an historical date when the Germans passed the Imperial Decree (Ordinance) in Tanganyika (Chigara, 2004). The same decree was passed in other German colonies for example in South West Africa (Namibia) on 22nd April 1896 some months later after German East Africa (Eley et Ratallack, 2008).

The Decree was the first legal codification to address the issue of jurisdiction to natives. With specific reference to corporal punishment, it provided that “women, children and natives of better standing were exempted from corporal punishment” (Eley et Ratallack, 2008: 172).

At home however, parents had a right to punish their children. This is due to the fact that courts recognized and favored that right. “The courts in German East Africa had borrowed the concept of the parental right to punish from the German Civil Code and applied it to natives.....” (Conrad, 2010: 89).

The reason behind ‘borrowing’ is based on the fact that the German rule applied a dual system. The issued decree was applicable to natives and others who are non-Europeans such as Arabs, Indians, Goans, Afghans and Banyans. As pointed out by Deutsch, “the decree stipulated that Africans and non-European residents fell under German civil and Criminal law only if the governor issued a decree to that effect. However no such decree was ever enacted” (Deutsch, 2010:135).

In schools it was being administered under the umbrella of school discipline. As a matter of practice the German *Reich* (empire) banned conditionally corporal punishment at schools from 1910. However it could be justified for disciplinary purposes at schools and in jails. Hence, corporal punishment continued to be administered on the basis of school discipline (Eley et Ratallack, 2008).

The German rule made parental corporal punishment lawful through court practice. Indirectly it legalized it to be applicable at schools with justifications of control of school discipline which is the usual argument. Moreover we find nothing to avoid its application in care institutions and in juvenile courts if at all such arrangements were made to exist at the epoch.

3.3 Discussion.

Although the German reign did not last for a long time, it raised many questions for discussion. Among them are: a decade without statutory provision, the ban of school corporal punishment in Germany and its effects on colonies, power and autonomy as a characteristic of German administration, its effects on the application of the law and a marked period of brutality.

The Imperial Decree of 1895 was the first law on the land in relation to jurisdiction over natives. The first decade of their rule passed without statutory provisions for instance on recruitment of labour (Conrad, 2010). Due to that lacuna and as matter of practice, children were working with their parents (Iliffe, 1979) and therefore in this dissertation, we argue that children too could undergo corporal punishment as well in the course of work.

Moreover, colonialists had habits of importing certain attitudes from their mother land and applied them in colonies. That being the case, the German Reich had banned school corporal punishment in 1910 except for disciplinary purposes (Eley et Ratallack, 2008). Since they were the colonial masters with power to determine which law and policy to apply in colonies, one will be tempted to fall in a conclusion that they applied the same police even in colonies. Corporal punishment went on to be applied in schools as a means of controlling discipline.

However the German rule was characterized by power and autonomy of district officers. In fact the district commissioners were almost at absolute liberty. As remarked, “no provincial commissioners supervised district officers. A remote station could expect a visit from a senior official only once a decade” (Iliffe, 1979:119). That means in practical sense the application of the law differed from one place to another depending on the mercy of district officers and reality on the land. As supported by Eley et Retallack in quoting Klaus Richter “colonial law and its application were shaped by action that had already occurred on the ground and were in response to them” (Eley et Retallack, 2008: 174). The colonial governor or colonial secretary issued administrative decrees and bans that had no approval of the *Reichstag* (Wildenthal,

2001). In that way we find it practically sounding that the district officer being at liberty and his experience on the land, could administer corporal punishment to children even though it was forbidden under the law.

The particularity of German rule was marked by highest level of brutality to Tanganyikans which took away many lives (Iliffe, 1969, 1979; Stearns, 2008; Conrad, 2010; Mwakikagile, 2000; Taylor, 1963). For instance, Carl Peters was known in Swahili as *mkono wa damu* (the man with blood-stained hands) (Taylor, 1963; Mwakikagile, 2000; Smiley, 2003). On the other hand, it appears that the Germans lacked administrative skills of colonies. Such an outlook was even shared by their British and French counterparts claiming that to be the reason why they relied on corporal punishment and (Andrew et al.1981) ending up into numerous revolts by natives.

4. CORPORAL PUNISHMENT DURING THE BRITISH RULE

The British rule in Tanganyika started from 1920 and lasted up to 1961. It came as a result of the First World War whereby Britain received the League of Nations mandate to administer what was known as German East Africa except Rwanda and Burundi (Lohrmann, 2007). By article 119 of the treaty of Versailles, Germany renounced all its overseas colonies in favour of the principle and associated allied powers during the First World War (Taylor, 1963).

This particular part will focus on major three parts: First on population, political structure, economic activities and religion. Secondly, there will be an attempt to identify law(s) on corporal punishment that were applicable at that time. The third part will be a discussion.

4.1 Population, Politic structure, Economic activities and Religion

Population increased remarkably during this period after an endless decline during German rule. According to Iliffe, “it was not until the 1930s that the population began to reproduce itself ” (Iliffe,1979:166). Such a fact is vividly shown by the population growth for instance in Dar es salaam from some 20,000 to over 30,000 between 1914 and 1939 (Iliffe, 1979).

Moreover population showed a trend of increasing with time throughout this period. It is estimated that in 1931, the total population was between 4,500,000 and 5,200,000 while in 1939 it had increased up to between 4,600,000 and 5,500,000 (Iliffe, 1979). In 1957 the

population had almost doubled up to 8,665,336 divided among 120 ethnic groups, the largest being the Sukuma and others in descending order the Nyamwezi, Makonde, Haya, Chagga, Gogo, Ha and Hehe (Lohrmann,2007).

The British applied an indirect rule in their struggle for political control in Tanganyika right from 1925. It was not successful until the arrival of Sir Donald Cameron in Tanganyika. He became a governor in Tanganyika in 1925 and had a practical experience of indirect rule in Nigeria where he was a commissioner for seventeen years (Iliffe, 1979).

As a result up to 1931 almost the whole country was already covered by the native administration and properly linked from the remotest villages up to the provincial commissioner. In appreciating the establishment of the system in 1928 in a tour to Sukuma land, Cameron remarked “ the peasant of remote Meatu on the shores of lake Eyassi is now linked up to his headman, the headman to the sub-chief, the sub-chief to the chief and the chief to the district office. As a result, the provincial commissioner could be aware of what was happening throughout his province” (Iliffe, 1979:325).

The key supporters of indirect rule were chiefs as the system favoured a flourish of chiefdoms which were destroyed during German rule. Chiefs played a central role in the system by collecting the levied taxes. They were paid by the central government and at the same time they retained a portion of taxes they collected. A good example is Kalemera of Kianja who in 1927 had between 20,000 to 30,000 tax payers but he earned an income of British Pounds 2,773 more than Kabaka of Buganda (Iliffe, 1979).

However Tanganyika was different from other colonies in the sense that it was a United Nations trusteeship territory. As a result, Britain was not only answerable to its parliament as regards the administration of the colony but also to the United Nations. The United Nations was at liberty to examine, evaluate and criticise the way the territory was being governed. The trusteeship Council for instance criticised the British educational policy for being unsatisfactory in Tanganyika (Lohrmann, 2007).

On the other hand, this was a unique opportunity to colonial people to rise up voices on issues of their concern and they were at liberty to form associations, address common grievances and thereby cement their unity. Associations ranged from farmers such as Kilimanjaro Native Planters Association (KNPA), The Bukoba Bahaya Union to political parties such as

Tanganyika African Association (TAA), United Tanganyika Party (UTP) and the most important is Tanganyika African National Union (TANU) which led Tanganyika to attainment of independence (Taylor, 1963; Iliffe, 1979; Lohrmann, 2007).

Furthermore, Tanganyika's grievances could be addressed to an outside body (United Nations) by means of petition. TANU for instance under the leadership of Julius Kambarage Nyerere (*mwalimu*) made several petitions to the United Nations to demand for independence of Tanganyika which ultimately was attained on December 09, 1961 (Iliffe, 1979; Lohrmann, 2007; Taylor, 1963).

Economic activities during the British rule remained in principle the production of cash crops which were introduced by the Germans. However, unlike the German rule, there was no more forced labour which in turn increased crop output with remarkable traces of regional specialization (Iliffe, 1979).

The Chagga coffee growers for example increased the coffee trees from 100,000 in 1916 to 987,175 in 1925 and up to six million five years later. Such an increase went hand in hand with an increase of coffee growers whereby 1925 there were 6,716 coffee growers, hence an average of one man in every three men something that even by force did not happen during German rule (Iliffe, 1979).

Moreover there came specialization in the sense that each region as known today developed certain particularity. In terms of cash crops, the Sukuma specialized in cotton production, Tanga in sisal, Bukoba, Kilimanjaro and Mbinga in coffee production. Kigoma became famous in saladines (*dagaa*) from Lake Tanganyika, Gogo in cattle rearing, Zaramo in charcoal production, Buhaya in banana, Ulanga in rice, Tabora in coconuts and Sukuma advanced in maize production. Consequently, throughout the period there was no experience of serious famine just as it was between 1890 and 1919 (Iliffe, 1979).

As regards religion, Christianity continued to take a lead in comparison with indigenous religions. That was evidenced by an increased evangelization, growth of number of followers, for instance in Kilimanjaro alone there were more than 10,980 professing Christians in 1922 and country wise, the percentage of Christians rose from 2% in 1914 to 10% in 1938 (Iliffe, 1979).

4.2 Applicable Law on corporal punishment

On 1st July 1930, the British passed the Corporal Punishment Ordinance which is the principle law in all matters relating to administration of corporal punishment to minors (Winterdyk, 2002) as well as adults. The said law is still valid in Tanzania mainland hence it is still in force cited as CAP.17, (R.E.2002) of the laws of Tanzania. However it was amended in 1963, 1972 and 1989.

The said law (Ordinance) under section 2 defines corporal punishment to mean:

(a) Whipping in case of adults, (b) Canning in case of juveniles

Section 5 provides that “Any person convicted of any offence mentioned under part 1 of the schedule to the Ordinance shall be liable to corporal punishment in lieu of or in addition to any other punishment which he may be liable for such offence”. As Nalla noted that corporal punishment was one of the punishment permissible under section 28 of the Penal Code of 1945 in accordance with the Corporal Punishment Ordinance of 1930 (Nalla, 2010).

Section 6 provides that “Any juvenile convicted of any offence under the Penal Code other than an offence punishable with death or any offence punishable under the law with imprisonment shall be liable to corporal punishment either in lieu of any other punishment to which he may be liable for such offences”. As substantiated by Milner “since 1957 juveniles have no longer been admitted to prison merely for corporal punishment which is now administered away from prison” (Milner, 1969:158).

Section 8 of the Ordinance limits the application of the law such that corporal punishment cannot be inflicted on females, males convicted of death and males over 45 years.

It goes on to provide that the number of strokes shall not exceed 24 for adults and it shall not exceed 12 for juveniles. Further, no two inflictions of corporal punishment shall be administered within 14 days of the previous infliction nor shall the administration be in public unless the court finds it so desirable in case of juveniles.

Under section 9 the Subsidiary law lays down rules on how to implement the corporal punishment ‘Rules 2 and 3 deal with how to inflict the corporal punishment on adults and juveniles with description of cane to be used. Rule 4 describes the need to make a person secured so that the case cannot fall on another part of the body. Rule 5 provides for piece of

cotton cloth soaked in an antiseptic solution to be kept spread over the buttocks of the person to undergo the punishment (Final Report of the Law Reform Commission of Tanzania, 1996).

In schools, there was no limit as to the number of strokes, it was rather left to be determined by the respective teacher (Mwakigagile, 2010). The British regime even encouraged the use of corporal punishment at schools under the belief that “without ‘*kiboko*’ (corporal punishment) the African’s advancement in education would be very slow” (Final Report of the Law Reform Commission of Tanzania, 1996).

At homes, on the basis of interviews, corporal punishment was and still is being encouraged as a method of correcting a child from bad behaviours. It was a normal practice taken to be a parental right.

The British believed in the saying ‘Spare the rod, spoil the child’. Hence they legalized corporal punishment to children in judicial systems, in schools and by acceptable practice it was made lawful in homes.

4.3 Discussion.

The British rule lasted for more than 40 years in Tanganyika which is a long period compared to the previous German reign which lasted for almost 25 years. The British did not face any serious native resistance as the road to colonization was already cleared by the Germans. Despite all these facts in favour of the British rule, apart from social life improvement, there was no any serious investment and they retarded academic development compared to the German rule. Furthermore, corporal punishment under the ordinance was degrading and the ordinance was discriminatory. These are issues that will guide a discussion in this part.

On one hand, one is tempted to argue that the manner the Corporal punishment Ordinance was applied was degrading one’s humanity and dignity. By going through section 9 of the Subsidiary legislation which lays down the procedure on how it should be administered, one would find it to be inhuman. For instance, sub rule 5 of rule 9 provides that in inflicting the corporal punishment, “a piece of cotton cloth soaked in an antiseptic solution is to be kept spread over the buttocks of the person undergoing the punishment”, which appears to be a shameful act. Moreover it is in direct conflict with article 40 of the UNCRC (1989) which provides that “.....every child alleged as, accused of, or recognized as having infringed the

penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth.....''.

On the other hand it is degrading in the sense that in inflicting the punishment to juveniles (in exclusion of adults), it is possible in public. Section 8 of the Ordinance does not provide for the administration of corporal punishment to be in public unless the court finds it so desirable in case of 'juveniles'. This is contrary to the spirit of the law UNCRC in all procedural matters while dealing with minors in courts of law, specifically section 40 (2 b) (vii) which provides that "Every child alleged as or accused of having infringed the penal law has at least the following guarantees, to have his privacy fully respected at all stages of the proceedings".

The Ordinance is not only degrading but also discriminatory which is clearly seen through its deliberate exclusion of women from undergoing a corporal punishment. One may argue that to be positive discrimination (Edwards et Battley, 1978) in favour of women, but discrimination remains to be discrimination as it was not backed up by any solid legal argument especially when juveniles (male and female) commit similar offence which should attract the same punishment or are found to be co-offenders. This point will be developed further in the last part otherwise it suffices so to argue with respect to this part.

Furthermore, discrimination can be seen in the law itself in affording the possibility of inflicting corporal punishment to juveniles in public while denying the same possibility to adults. At this point one may seek wisdom in English saying that '*what's good for the goose is good for the gander*' hence emphasizing equal treatment in similar situations. In other words under this law juveniles were being treated as persons of lower class compared to adults (Saunders et Goddard, 2010; Durrant et Smith, 2011). This point will be dealt with in details in next part.

Nevertheless, during the British rule there were measurable social life improvements which are marked by lack of forced labour, increase of production, absence of serious crashes resulting into casualties and increased freedoms especially the formation of associations ranging from cooks to political parties.

However, one has to note that not all things were bad during the German rule; the same not all were good during British rule. The British never made any serious investment in vital economic sectors. They dwarfed and retarded academic development in Tanganyika

compared to the Germans who were excellent for that (Lohrmann, 2007). As correctly put by Iliffe, during Germany rule several Tanganyikans studied and had an opportunity of studying in abroad but the British rule brought that to an end. He goes on saying, that one reason for developing Makerere to be a university was to prevent East Africans from absorbing subversive ideas from foreign universities (Iliffe, 1979).

5. CORPORAL PUNISHMENT AFTER INDEPENDENCE.

Tanganyika celebrated its independence on December 09, 1961 under TANU with (*mwelimu*) Julius Kambarage Nyerere as its chairman. It is the first country to celebrate independence in the East African region. Since independence it has undergone several changes politically and economically, with pressure from within and external which all together have had great impacts economically, politically and socially (Shivji, 1990; Ngasongwa, 1992; Nyirabu, 2002; Kaiser et Okumu, 2004; Ngowi, 2009; Havnevik et Isinika, 2010).

Hence this part will cover the period from the time of independence up to 2010. It will concentrate on major three parts id est historical perspectives which will focus on population, political structure, economic activities and religion. The second part will look at the existing legislation on corporal punishment and how they influence one another. The last part will be a discussion on rights of a child.

5.1 Population, Political Structure, Economic Activities and Religion

At the end of German rule in 1919, the population of Tanganyika was about 4 million (Iliffe, 1979), by contrast at the time of independence in 1961 it was about 9 million (Ludwig, 1999; Iliffe, 1979). From there on the population has been growing. This fact is indicated by the 2002 Population and Housing Census whereby the population had increased from 23.1 million in 1988 to 34.4 million in 2002 (United Republic of Tanzania, National Population Policy, 2006).

It is further shown that the average growth rate is 2.9 % per annum and the total population consisted of 44 % of persons below 15 years while persons above 65 years were 4%. It made projections of the population to reach at 63.5 million in 2025 (United Republic of Tanzania, National Population Policy, 2006).

Politically, since independence Tanganyika has undergone several political changes including the union with Zanzibar, amalgamation of political parties, introduction of multi-party democracy and embracement of capitalist ideologies (Kaiser et Okumu, 2004; Ngowi, 2009; Havnevik et Isinika, 2010; Ngasongwa, 1992; Nyirabu, 2002). These changes have either necessitated or influenced further changes in its legal system and legislations on corporal punishment to children (Ngasongwa, 1992; Nyirabu, 2002).

As earlier presented Tanganyika celebrated its independence on December 09, 1961 and a year later it declared itself to be a republic on December 09, 1962 under the Republican Constitution of 1962 (Ngasongwa, 1992; Mwakikagile, 2006; Nyirabu, 2002; Othman, 2009). On 26th April 1964 it entered into union with Zanzibar under the Union Agreement (commonly termed as 'Articles of Union') to form one sovereign Republic 'the United Republic of Tanganyika and Zanzibar' (Shivji, 1990; Nyirabu, 2002; Othman, 2009) which was later on renamed as the United Republic of Tanzania on 29th October 1964 (Othman, 2009).

Furthermore, the Republican Constitution of 1962 created the Interim Constitution in 1965 which under article 3(1) provided for one political party in Tanzania, id est TANU for Tanzania mainland and A.S.P for Zanzibar which marked the beginning of mono-party democracy (Ngasongwa, 1992; Nyirabu, 2002). In order to assume party supremacy the government passed Act No.18 of 1975 which amended article 3 of the Interim Constitution such that all political activities in Tanzania shall be conducted by or under the auspices of the party and further that the function of all organs of the state of United Republic of Tanzania shall be performed under the party (Engel et al., 2000; Ngasongwa, 1992; Nyirabu, 2002).

The government adopted the permanent Constitution in 1977 which included all the previous amendments. (Currently this is the constitution in force as amended from time to time) In the same year on 05th February, TANU amalgamated with A.S.P. to form Chama Cha Mapinduzi (C C.M) (literary a revolutionary party) which is currently the ruling party. Consequently, article 3 of the Constitution of 1977 was amended to read that CCM will be the sole political party in Tanzania and article 3(1,2) that C.C.M. .will be final in respect of all matters in Tanzania (Engel et al., 2000; Nyirabu, 2002; Ngowi, 2009).

However from 1980s there was external pressure from western donors and especially the so called World Bank (Havnevik et Isiniki, 2010) on Structural Adjustment and subsequent

economic and institutional reforms as well as internal pressure from prominent persons like Nyerere when he said in 1991 “the one party is not Tanzanian ideology and having one party is not God’s will....one party has its own limitations ” (Daily News, 22, Feb 1990).

As a result in March 26th 1991, president Ally H. Mwinyi (as he then was) formed a commission under the chairmanship of Chief Justice Francis L. Nyalali (as he then was). The said commission is commonly referred to as ‘Nyalali Commission’ to make an inquiry throughout Tanzania on people’s preference whether mono-party or multi-party system. One of the recommendations of the Commission was either the repeal or amendment of a set of identified 40 laws including the ‘Corporal punishment Ordinance of 1930’ which is our concern in this study (Final Report of Law Reform Commission of Tanzania, 1996).

As regards economic activities, after independence just as it was during colonial rule, agriculture went on taking the lead as the major economic activity in Tanganyika. While it accounts for about half of the national income, it provides employment opportunities to about 82 % of the labour force and women are dominating in this sector (Ellis et al., 2007). Major cash crops continue to be the ones which were introduced in the colonial era (www.tanzania.go.tz/agriculture.html). It is important to note food crops dominate the agricultural economy.

Mining is another economic activity which was developed after independence. This is due to the fact that Tanzania has a number of mineral resources such as tanzanite in Arusha, diamond in Mwadui Shinyanga, coal in Mbeya, gold in Mara and the recently discovered uranium. Mining contributes about 2.3 % of the G.D.P which is projected to increase up to 10 % in 2025. (www.tanzania.go.tz/mining.html).

The country is endowed with tourist attractions such Kilimanjaro mountain, Serengeti national parks, Ngorongoro crater and Katavi national park and several other game reserves. From 1990s tourism has become a reliable source of foreign income in the economy of Tanzania and has added to the number of economic activities in substitute to the traditionally dependent agriculture (Kweka et al., 2003).

As regards religion, after independence citizens have continued to enjoy the freedom of worship and the government has remained apart without affiliation to any particular religion.

Major religions have continued to be Christianity, Islam and indigenous ones consisting of various ancestral venerations (Wilsen et Mfumbusa, 2004).

However there is no clear number of believers for each religious sect and the government has not made any initiative to have the exact number in several censuses which have been conducted in Tanzania. It remains therefore to be a matter of estimation. Nevertheless at the time of independence when the total population was estimated to be 9 million, Muslims were estimated to be 20% to 25 %, Christians 20% to 25 % and the traditionalists were 30% to 40% (Ludwig, 1999).

5.2 Applicable law on corporal punishment

After independence Tanzania retained the Corporal Punishment Ordinance which is now cited as CAP.17 (R.E.2002) and enacted some new Acts. A thorough scrutiny reveals that even the new ones still retain some colonial influence. Hence this part will focus on the laws that were/are applicable for the respective period.

In the judiciary, corporal punishment was also administered to children under the Minimum Sentences Act, 1963 which was enacted two years after independence. According to the preamble, the purpose of this law was to “provide for the imposition of minimum sentences on persons convicted of certain offences.....to increase the jurisdiction of certain courts in relation to certain offences”. Under section 2(1) it provided that it shall not apply to any juvenile and the imposition of corporal punishment shall not apply to any female under section 2(2)(a). Under section 3, it defined a ‘juvenile’ as “ a person under the age of sixteen years ”. Thus it was still applicable to minors who were above 16 years.

The effect of this law was to restrict the discretion previously available to judges and magistrates when sentencing convicted persons. The imprisonment and corporal punishment were made mandatory for offences under the specified schedules under this law (Milner, 1969; Williams, 1974; Bassiouni et Motala, 1995; Nalla, 2010). The Act however attracted the attention within and outside the country especially on the mandatory infliction of corporal punishment (Williams, 1974).

In 1972 the government passed the Minimum Sentences Act, 1972. It reads on the preamble that its objective was to repeal and replace the Minimum Sentences Act of 1963. Section 2 of the act provides that it shall not apply to juvenile. Under section 3 it defines a juvenile as

“any person under the apparent age of eighteen years ”. The mandatory corporal punishment imposed by the Minimum Sentences Act, 1963 was abolished by the Minimum Sentences Act of 1972. It is interesting to note that what was abolished in 1972 was reintroduced by the Written Laws (Miscellaneous Amendments) Act No.10 of 1989 (Nalla, 2010). However it should be noted further that these two acts did not apply to minors as the age of a juvenile in the Minimum sentences Act of 1972 was raised up to 18 years.

In schools, corporal punishment is administered under the National Education Act, 1978, Act No.25 of 1978. In this law, corporal punishment is administered to pupils under the National Education Corporal Punishment Regulations, (Control of Administration of Corporal Punishment to Schools) 1979 made under section 60(1) of the National Education Act (Final Report of Law Reform Commission of Tanzania, 1996).

Under this Act, punishment means striking a pupil on his hand or on his normally clothed buttocks with a light flexible stick. It excludes striking a child with any other instrument or any other part of the body, hence, the notion of ‘reasonable chastisement’. It provides further that corporal punishment is only to be administered for serious breach of school discipline or grave offences. Strokes shall not exceed six in any occasion. On the contrary, the Act permits the application of corporal punishment to female pupils. It can be done only by a female teacher, where there is no female teacher, with a written permission from the head of school (Final Report of Law Reform Commission of Tanzania, 1996).

At homes and in care institution, until 2009 in general there was no law which requires parents, guardians or care givers to refrain from administration of corporal punishment. However in November 2009 the government enacted the Law of the Child Act, 2009. which under section 13 it does not prohibit the administration of corporal punishment to children at school, at home, in juvenile courts and in institutions even though it does not explicitly mention administration of corporal punishment. On the basis of the minister’s (Community Development, Gender and Children) official statement while responding to questions of members of parliament on corporal punishment in the ‘Law of the Child Act Bill, 2009’ she said “*on the basis of the research which was conducted by the Law Reform Commission of Tanzania, majority of the citizens preferred a reasonable chastisement as a method of correcting and disciplining children. Hence we order that a child should neither be corporally punished in a degrading manner nor should corporal punishment exceed limits.*

Section 13 of the bill puts limits while administering corporal punishment. One should take into account age, health and understanding of a child''. (Hansards, Parliament of Tanzania, 04th November, 2009).

The crucial question is how the government arrived at the position of retaining corporal punishment in this law. The position can trace its source from the British colonial regime and is a continuation of the Corporal Punishment Act, CAP.17 (R.E.2002) of 1st July, 1930. That becomes clear when the minister substantiated that the government's position of retaining corporal punishment bases on the research which was conducted by the Law Reform Commission of Tanzania.

The said research was conducted in 1996. In fact the research came as a result of the recommendation of Nyalali Commission which in its findings conclude that the Corporal Punishment Ordinance is cruel, inhuman and degrading. It further remarked that it is unconstitutional because it violates articles 13 (6) of the Constitution of the United Republic of Tanzania of 1977 (as amended). The Nyalali Commission recommended further that either the Law Reform Commission or the Attorney General's Offices to make further research on this law (Final Report of Law Reform Commission of Tanzania, 1996).

The Law Reform Commission from 12th May, 1996 to 13th June 1996 conducted a research to collect public views from all regions of Tanzania Mainland on whether to repeal or retain this law. In its final assessment on the basis of the research, it recommended among others that the law be retained and it should not be discriminatory between sexes, hence it should apply to both men and women (Final Report of Law Reform Commission of Tanzania, 1996).

The minister therefore while addressing the parliament during the second and final reading of the Bill on 4th November 2009, convinced it to retain the section on administration of corporal punishment to children in the Law of the Child Act Bill, 2009 that it is still relevant and useful on the basis of the research conducted. In fact the 'research' she was referring to, was conducted by the Law Reform Commission in 1996 (whether to repeal or retain the Corporal Punishment Ordinance), while in 2009 it was almost 13 years ago. Consequently, the bill was passed to be the law on 20th November, 2009.

5.3 Discussion on rights of a child

On 09th December 2011, Tanzania has celebrated the 50th anniversary of independence. Despite such a fact, the country still maintains colonial attitudes over corporal punishment. On that basis the discussion will mainly focus on two major issues, id est corporal punishment to children as a violation of human rights of children and the cultural shift in the sense that it is outdated to advocate for corporal punishment towards children.

Corporal punishment to children breaches the human rights declared and guaranteed by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights with particular reference to respect for every person's human dignity, physical integrity and to equal protection under the law. Indeed these principles are the cores of human rights. (Save the Children, 2003; Bitensky, 2006; Human Rights Watch 2008; Durrant et Smith, 2011). Tanzania is signatory to these instruments.

These fundamental rights are guaranteed to every person 'everyone' without any exception provided one is a person. Hence 'hitting people is wrong and children are people too', under the same protection as adults (Save the Children Sweden; Durrant et Smith, 2011). Thus, defences in states' legislation such as 'reasonable chastisement, lawful correction, justifiable punishment' are deliberate violation of children's rights and symbolic indications that children are persons of low status (Durrant et Smith, 2011; Saunders et Goddard, 2010).

Moreover, according to Saunders et Goddard, it is worth noting that, "in many English-speaking countries, children continue to be the only people who may be lawfully punished" which is "symbolic indications of their low status" (Saunders et Goddard, 2010: 26). This statement holds water with particular reference to Tanzania an English speaking country. This might be due to British policies over corporal punishment which penetrated to Tanzania through colonisation. As illustrated in Tyrer's case, the administration of judicial corporal punishment in England is similar to Tanzania under the Corporal Punishment Act. The case was filed in 1978 in the ECHR against United Kingdom. Anthony Tyrer was a 15 year old boy living in the Isle of Man. He was convicted of assault in 1972 and sentenced to be birched. The ECHR stated that ".....the applicant was made to take down his trousers and underpants and bend over a table; he was held by two policemen whilst a third administered the punishment....." (Durrant et Smith, 2011: 8). Six judges of the ECHR found the punishment to be degrading and in breach of article 3 of European Convention on Human

Rights (1950) while the British judge of the same court dissented from the judgment (Durrant et Smith, 2011).

Moreover the UNCRC under article 19 requires state parties to protect children from all forms of physical and mental violence. Article 28(2) of the same Convention requires school discipline to be consistent with the child's human dignity and in conformity with the present Convention. For that reason, the Committee of the Rights of the Child has tirelessly stated that corporal punishment is incompatible with the Convention. It has urged the state parties including Tanzania which is a signatory to the Convention to enact or repeal as a matter of urgency their legislations in order to prohibit all forms of violence as required by the Convention (Saunders et Goddard, 2010; Save the Children-Sweden).

Furthermore, under article 37 of the UNCRC state parties are required to ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. On that basis the Committee of the Rights of the Child condemns tolerance of any level of violence against children such as 'reasonable or moderate corporal punishment'. It emphasizes that, "eliminating violent and humiliating punishment of children through law reform and other necessary measures is an immediate and unqualified obligation of state parties" (Saunders et Goddard, 2010: 27).

As matter of fact the purpose of UNCRC is to re-emphasize on the universality of human dignity which includes children. They are right holders just as adults are including the right to respect for their human dignity, physical integrity and equal protection under the law. (Durrant et Smith, 2011; Saunders et Goddard, 2010). It is undisputable that one of categories of the rights of the child is 'protection' which is an obligation of states. The United Republic of Tanzania therefore has an obligation to protect children against all forms of violence including judicial, school and parental corporal punishment under the law.

On the other side of the coin, in the 1970s there has been a cultural shift whereby corporal punishment was no longer seen to be a private family matter but rather as a society concern. Due to that physical abuse such as corporal punishment is taken by many states to be a violent act to children whereas before 1970s almost everyone believed in the principle of 'Spare the road, spoil the child' (Durrant et Janson, 2005; Straus et Donnelly, 2005).

Before the cultural shift, children were not accorded the same right as adults and the idea of children being holders of rights was not even addressed (Hanson, 2008). Hence, violence such as parental corporal punishment was legally accepted as a parental child discipline. For instance in 1975 the father who had beaten severely a three year old boy was acquitted by the court in Sweden (Durrant et Janson, 2005; Saunders et Goddard, 2010).

However, with an advent of cultural change, corporal punishment is taken to be a form of violence, a humiliating and a degrading punishment (Durrant et Janson, 2005). There is no dispute that corporal punishment was legally and socially acceptable before 1970s but time has changed and type of punishments change too, in other words every period in history has its own punishment (Hart, 2005). For instance until 1870s courts in America recognized husband's right to physically chastise an errant wife (Straus et Donnelly, 2005) and the husband (by the old law) was allowed to moderately correct his wife just as man is to collect his child (Saunders et Goddard, 2010).

It is now a history that sometimes in human development a man (husband) had legal rights to physically punish his wife, employees and apprentices. It is only for children where it is still lawful.

6. CONCLUSION

Realization of children's rights does not come over night but it is rather a process of change which Tanzania (Mainland) is still undergoing. The process will become complete when a 'right' as declared in the UNCRC is recognized to be a 'right' in the eyes of the society. Moreover, to be successful, public education efforts are to be directed towards the shifting of attitudes and practices which are contrary to children's rights.

On the hand, Tanzania (Mainland) like many other developing countries, has only celebrated its independence but has not yet gained its independence. It is still feeling the pinch under the tentacles of colonialism which fetter realization of children's rights. Hence, on the balance sheet corporal punishment appears to be a lesser evil than other basic rights such as health and education. In terms of priority administration of corporal punishment does not seem to be a major problem.

However, all the laws on corporal punishment that we have identified in this study and which were applicable in different epochs is the result of colonialism. After its independence Tanzania mainland retained colonial law and enacted others to widen and cement its applicability. It is in this spirit that the Law of the Child Act, 2009 has retained the administration of corporal punishment to children.

The question can be asked if 'Prohibition of corporal punishment is neo-colonialism'?. The term 'neo-colonialism' was first introduced by Nkrumah to describe a systematic method of dominance moulded by colonialists (usually former European colonies in Africa or Asia) in order to keep them in control of the resources that is needed to drive their economies back home. It operates not only in the economic field but also in political, religious, ideological and cultural spheres (Nkrumah, 1965).

It is undisputable that the influence and pressure to eliminate all forms of corporal punishment under the law in Tanzania Mainland comes from the Western side. On that basis we find it logically sounding for Tanzanians to hesitate on passing the law(s) which is contrary to their culture. To that, they think could be the penetration of neo-colonialism to their culture as the methods of neo-colonialists are subtle and varied.

The idea lies to the fact, even though laws on corporal punishment tap their sources from colonial influences which has continued to dominate the daily life, it is already accepted as the culture for Tanzanians. Hence, social, cultural and legal changes taking place in former colonial powers are introduced to their former colonies, which is seen by the former colonies as western strategic methods of cultural domination.

However, on the basis of the data collected and the analysis thereof, a view that refutes considering prohibition of corporal punishment as neo-colonialism can be defended. Tanzania ratified the UNCRC and has an obligation to protect the child against all punishments which are inconsistent with the child's human dignity and not in conformity with the UNCRC. As the UNCRC has changed attitudes and practices regarding the treatment of children, we argue that punishing a child corporally should be regarded as outdated, also in Tanzania (Mainland).

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